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Nos. 78 and 106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

ATLANTIC CITY ELECTRIC COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ALABAMA POWER COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeals From the United States District Court for the Southern District of New York and the United States District Court for the District of Columbia

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BRIEF OF APPELLEES ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.

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BRIEF OF APPELLEES ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.

QUESTIONS PRESENTED

In a general revenue proceeding the Interstate Commerce Commission entered orders permitting the railroads to increase the general level of freight rates, within certain maximum limits, on the basis of findings

that applied "to the general bases of rates and charges" but did not make any final determination on the legality of particular rates. The questions presented are:

1. Whether the orders and findings of the Commission are reviewable on the complaint of shippers who have not availed themselves of their specific statutory right to have the Commission determine the legality of the particular rates specifically applicable to the commodities that they ship.

2. If the first question is answered in the affirmative whether the orders of the Commission here in issue represent reasoned exercises of the Commission's judgment, are supported by substantial evidence on the entire record, and are otherwise lawful.

STATEMENT

These cases arise in the context of an economic problem that is of the utmost importance to the railroads of the United States.[1] The inflationary conditions of recent years have imposed particularly heavy burdens upon the railroads. The wages of their employees and other costs, including those for material, equipment and capital, have been rising continuously and rapidly. *Because their rates are subject to comprehensive and* detailed regulation the railroads have not been able to respond to these inflationary pressures with the same degree of promptness and flexibility that is available to unregulated businesses. This limitation on the capacity of the railroads to deal promptly with the gap between their costs and their revenues has been one

[1] The appellee railroads in this case include substantially all the Class I railroads of the United States (App. 13a-26a).

of the important causes of the critical problems that now afflict the entire industry.[2]

Between 1960 and 1967 the railroads were able to sustain their operations without any general increase in freight rates because heavy capital investments in the period yielded efficiencies that offset gradually increasing wages and other costs. In the latter part of the period, however, costs began to rise steeply and advancing technology did not produce offsetting efficiencies. In 1967 the railroads found it necessary to propose a general increase in freight rates and in 1968 the Interstate Commerce Commission permitted this increase to go into effect. *Increased Freight Rates, 1967*, 332 I.C.C. 320 (1968) (Ex Parte No. 256). Even as the Commission proceeding in Ex Parte No. 256 was in progress, however, it was apparent that inflationary pressures were such that a further increase was necessary.

On March 7, 1968, the railroads initiated the general rate increase proceeding here involved (Ex Parte 259) by a petition to the Commission (App. 226a). As a general rule carriers may initiate rates simply by filing tariffs or tariff amendments without prior approval of the Commission, the proposed rates being subject to the discretionary power of the Commission to investigate their lawfulness and to suspend their effectiveness for a limited period pending investigation. See Sec-

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[2] See generally Hearings Before the Senate Committee on Interstate and Foreign Commerce on S. 1461, 83 Cong., 1st Sess. 14-15, 40-41 (1953); Progress Report of the Domestic Land and Water Transportation Subcommittee of the Senate Committee on Interstate and Foreign Commerce pursuant to S. Res. 50, 82 Cong., 1st Sess. 63-65 (1951) (Rep. No. 1039).

tion 15(7) of the Act.[3] However, when an increase affecting a vast number of rates is to be made it is impractical to comply with the technical regulations of the Commission prescribing the form of railroad tariff publications. For this reason the railroads' petition asked the Commission to waive compliance with those regulations (App. 223a). The petition also asked the Commission to modify any outstanding rate orders of the Commission to the extent necessary to permit the filing of the proposed rate increases (App. 233a).[4]

The Commission on March 8, 1968, entered an order granting the requested ministerial relief from the tariff-publication rules and modifying outstanding rate orders to permit the filing of short-form rate increase tariffs (App, 236a). The railroads were given permission to file such tariffs to be effective on not less than 75 days' notice to the Commission and the public (App. 236a).[5] Accordingly, on March 11, the railroads filed

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[3] All statutory citations, unless otherwise indicated, refer to the Interstate Commerce Act, 49 U.S.C. §1 et seq. Pertinent provisions of the Act are reprinted in the joint brief of the United States, the Secretary of Agriculture, and the Interstate Commerce Commission (pp. 56-59). Hereafter these parties are collectively referred to as "the Government."

[4] This prayer for relief was directed to two kinds of Commission orders that affected a comparatively small number of rates: (1) orders prescribing specific rates, or specific maximum rates, for particular movements of particular commodities, and (2) orders granting relief from the provisions of Section 4 of the Interstate Commerce Act which prohibits a carrier from charging more for transportation of like goods over a shorter distance than over a longer distance in the same direction on the same line and from charging through rates that exceed the aggregate of intermediate rates.

[5] The Commission's order directed that the tariffs include a provision that, in the event any increases resulting from the application of the tariffs exceeded increases subsequently approved or prescribed by the Commission, the railroads would make appropriate refunds (App. 236a-237a).

tariffs increasing freight rates generally by amounts varying by commodity and ranging from 3 to 10 percent. The Commission immediately established and thereafter followed an expeditious procedure, involving the submission of affidavits and written arguments for and against the increase and the hearing of oral argument, to assist it in deciding whether the tariffs should be suspended pending investigation (App. 239a-240a).

On June 19, 1968, shortly before the tariffs were to become effective, the Commission suspended the tariffs until January 23, 1969, but allowed the railroads to file new tariffs, to be effective on one day's notice, establishing rate increases not to exceed 3 percent, and instituted an investigation of the lawfulness of the rate increase originally proposed by the railroads (App. 239a-241a).[6] By the same order incidental Fourth Section relief was granted and other outstanding rate orders were modified to the extent necessary to permit the 3 percent general increase to be put in effect (App. 241a-242a).

By a subsequent procedural order of July 3, 1968, the Commission divided the investigation into subdockets for the purpose of hearings (App. 243a). One subdocket (Sub-No. 2) related to the railroads' costs and revenue needs, another concerned rates and charges for special services and each of the eight others concerned a group of commodities. In its order the Commission found that due and timely execution of its functions required an expedited decision and directed that there should be no recommended report

[6] The Commission's order directed that the new tariffs contain a refund provision similar to the one ordered for the original suspended tariffs (App. 241a).

by the examiners (App. 247a). Evidentiary hearings were held before four hearing examiners between September 9 and October 8, 1968. The case then was submitted to the Commission on the record made before the examiners in the several subdockets.

After receiving briefs from the parties, the Commission on November 25, 1968, issued an interim report and order vacating its suspension of the rate increases except on a few commodities (App. 274a). 332 I.C.C. 590. The rate increases authorized by the Commission became effective on November 28, 1968. On January 9, 1969, the Commission concluded the investigation by issuing its final report and order, which allowed the rates to remain in effect with some modifications (App. 281a). 332 I.C.C. 714.

In its interim report of November 25 the Commission's findings dealt primarily with costs and revenue needs, the subject of the proceeding designated as Sub-No. 2. It found that railroad operating expenses per 1,000 gross ton miles had decreased from $5.95 in 1961 to $5.58 in 1966—the period in which, as indicated above, the railroads by more efficient use of their capital had managed to hold their rates steady despite cost increases—and then had turned upward, reaching $5.96 in 1968 (App. 261a).[7] For a "constructive year," based upon 1968 traffic and second-half 1968 wage rates, materials prices and other costs projected for a full 12 months, the Commission found a unit cost of $6.05 per 1,000 gross ton miles, which is 8.42 percent above the 1966 unit cost (App. 261a).

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[7] A ton mile is a statistical convention representing the movement of a ton of freight one mile. It is used to measure productive transportation activity.

The unit cost evidence and certain other evidence as to costs and income that the Commission recited compelled the conclusion, the Commission said, that the entire increase sought by the railroads "would fall far short of meeting [their] revenue need due to increased operating costs" (App. 263a). This was based on a comparison between 1966 and the "constructive year." The Commission found 1966 to be a reasonable base year, whose use in the comparison the Commission drew was "fair to shippers" because it was a recent year but nevertheless a year whose experience was not affected by a major rate revision and a year in which traffic volume was close to the current volume (App. 263a).

In summary, the Commission found that increased expenses between 1966 and the constructive year amounted to $855 million, unaccompanied by any significant increase in traffic volume (App. 263a-264a).[8] It found that, if the full rate increase then pending were granted and yielded the revenues it was intended to yield, the railroads would still be nearly $90 million short in the constructive year of meeting the increased cost burden (App. 265a). The Commission concluded that the railroads were "in immediate need of additional freight revenue to offset, in part, their increased operating expenses . . ." (App. 265a).

The Commission also discussed the railroads' rate of return, noting, however, that its decision rested "on other grounds" (App. 265a), *i.e.*, the immediate need for more freight revenue brought on by the increase in expenses. It found that the industry's estimated return in the aggregate was 2.58 percent on net investment

[8] This increase was offset to the extent of $300 million by increases authorized in Ex Parte 256 (App. 264a).

in 1968 and its return had been only 3.90 percent in 1966 before the inflation made itself felt and that both of these were "clearly inadequate" returns (App. 267a). The railroads had presented in evidence a cost-of-capital study showing that they needed a return of 9 or 9½ percent to attract capital (App. 265a-266a). Without adopting this position the Commission found that a return "in the range of 4 per cent or less, which we have repeatedly characterized as substandard, is at least an indication that the underlying rate level is within the zone of reasonableness" (App. 267a). The Commission treated at length objections leveled by shippers against the railroads' rate of return calculations. Some it found baseless; others it agreed with, but the effect of adjusting for them was miniscule (App. 267a-273a).

The Commission's findings in its interim report were reaffirmed in its final report of January 9, 1969. In that report the Commission found, as it had previously, that the railroads had "a critical need" for additional revenues to offset, in part, increased operating costs (App. 391a). It also found that the public interest and the national defense interest "in a sound, adequate, and efficient transportation system will be adversely affected unless the proposed increased interstate freight rates and charges . . . are permitted to be continued or to be put into effect" (App. 391a). With certain modifications, the Commission permitted the proposed increases which had been made effective in November 1968 to remain in effect (App. 395a).

In the final report the Commission also dealt with those parts of the proceeding—Sub-Nos. 3-11—in which the increased rates were considered as they applied to special services and to categories of com-

modities. The Commission made it clear, however, that in allowing the proposed increases for particular categories of commodities it was not determining the lawfullness of particular rates and that its findings that the rate increases were reasonable as applied to different types of services and categories of commodities were merely findings as to the general bases of rates and charges (App. 393a). Thus the Commission did not engage in a detailed analysis of all the facts directly associated with particular traffic as it normally does in the usual case of an investigation of a particular rate or group of particular rates. "Costs of specific commodity movements are not in issue," the Commission said (App. 285a). It also pointed out that it was not determining whether the particular rates which would result from the increases were maximum reasonable rates (App. 283a).

The Commission's approach is illustrated by its treatment of Sub-No. 3, which related to coal traffic, an important commodity in which certain of the appellants are interested. In its discussion, the Commission (1) found against the shippers' contention that there would be wholesale diversion of coal traffic to other modes of transportation and conversion to other fuels if rates on coal were increased (App. 309a-310a), (2) remarked that "should competitive situations arise, appropriate adjustments can be made by producers and carriers" (App. 310a), and (3) found that the possibility of such situations arising "furnishes no ground for exempting coal from bearing an appropriate proportion of the increased revenues shown necessary" (App. 310a).

The Commission found that overall "the increased freight rates and charges authorized herein will not

exceed a maximum reasonable level," and that the increases would "have no undue adverse effect on the movement of traffic by railway" (App. 393a). The Commission made clear, however, that its "findings as to justness and reasonableness . . . will apply to the general bases of rates and charges, and will not preclude interested parties from bringing any maladjustments to our attention for correction" (App. 393a). Specifically, the Commission said that the increased rates were not to be "considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370," and would "in all respects, be subject to complaint and investigation as provided by the act" (App. 393a). The reference to *Arizona Grocery* means that a shipper may recover reparations with respect to any increased rate subsequently found unlawful, a right that would not be available if the rates were regarded as prescribed by the Commission. The Commission's orders thus preserved fully the right of shippers to complain against and have the Commission pass upon the justness and reasonableness of any particular rates by which they might be affected, award reparation for any past overcharge, and order an adjustment of rates for the future.

In its final order the Commission also modified its outstanding rate orders and granted such Fourth Section relief as was necessary to permit the proposed rate increases to become effective (App. 395a-397a). On the basis of its findings and the conclusions in the two orders the Commission vacated its order of suspension and discontinued the investigation proceeding (App. 395a).

The appellants, who are shippers or representatives of shippers, brought suits to enjoin and set aside the

Commission's orders. The appellants in No. 78 (Atlantic City Electric Co., *et al.*), who are shippers of coal, brought suit in the United States District Court for the Southern District of New York. The appellants in No. 106 (Alabama Power Co., *et al.*), who ship or represent shippers of a variety of commodities, brought suit in the United States District Court for the District of Columbia. The railroad appellees intervened as defendants in both cases (App. 50a, 186a).[9]

The appellants in the New York litigation attacked the Commission's order on procedural grounds alleging, among others things, that the Commission had erred by not providing for participation by its Bureau of Accounts in the administrative proceedings and by omitting to provide for a proposed report by the examiners "without stating on the record that this procedure was eliminated because of the necessity of the due and timely execution of its functions . . ." (App. 7a). These appellants also alleged that the Commission's findings, particularly as they related to coal traffic, were not supported by substantial evidence (App. 7a-9a). In its answer the Commission alleged that the Commission's orders were not reviewable and in addition denied that the actions of the Commission challenged were unlawful or improper (App. 45a-47a). At the suggestion of the court the Commission thereafter filed a motion to dismiss based solely on its defense of non-reviewability (App. 60a-61a).[10]

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[9] The State of New York and agencies of a number of states intervened as plaintiffs in the New York suit (App. 49a). The Secretary of Agriculture of the United States intervened as plaintiff in the District of Columbia suit (App. 192a).

[10] The railroad appellees did not file a separate motion to dismiss but supported the motion of the Commission (App. 70a).

On October 28, 1969, the three-judge court granted the motion to dismiss (App. 153a). 306 F.Supp. 338. Citing a line of decisions dating back to 1935, the court declared that these cases "held in substance that the court will not entertain a suit to enjoin an order of the Commission in a general revenue proceeding when the plaintiffs have not exhausted" their statutory remedy "to seek an adjustment of the particular rates which affect them" (App. 160a). The court pointed out that the plaintiffs and plaintiff intervenors could in such proceedings "achieve the relief they were really seeking, *i.e.*, a reduction in the particular rates" under which they shipped (App. 161a). It concluded that "the statute does not contemplate an attack upon the general revenue order at this stage" (App. 163a).

The appellants in the District of Columbia attacked the findings of the Commission, alleging that they were vitiated by various errors, were not supported by substantial evidence and were inadequate to support the Commission's orders (App. 179a-183a). The Interstate Commerce Commission defended the Commission's orders on the merits but did not contend that they were unreviewable (App. 204a-206a). The railroad appellees, in addition to defending the Commission's orders on the merits, also contended that the orders were not reviewable (App. 186a-191a).

The district court dismissed the complaint with one judge dissenting. The court referred to the same line of decisions relied upon by the New York court (App. 216a) and found them determinative against judicial review since express statutory remedies had not been exhausted (App. 215a). It noted also that the Commission itself in Ex Parte 259 had explicitly re-

served to all shippers the right to seek correction of any maladjustment and had stated that the increased rates "will, in all respects, be subject to complaint and investigation as provided by the act" (App. 215a).[11]

The inflationary pressures on the railroads have continued. An application for a further general increase averaging about 6 percent was filed in October 1969 and, after briefs and arguments, the increase was allowed by the Commission to go into effect in November without being suspended, subject to a further investigation to determine whether any of the increases were unlawfully discriminatory (Ex Parte 262).[12] The Commission terminated that investigation by an order dated July 16, 1970. 337 I.C.C. 436. In March 1970 the railroads proposed another increase averaging 6 percent. The Commission again received briefs and heard argument and thereafter suspended the increase to the extent that it exceeded 5 percent and ordered an investigation, which is still in progress (Ex Parte No. 265).

SUMMARY OF ARGUMENT

I.

In a general revenue proceeding such as the one here involved, the Interstate Commerce Commission determines whether general rate increases proposed by all railroads, or large groups of railroads, should

[11] The dissenting judge, although admitting "that there is little direct language in the existing cases supporting judicial review of the order now," stated that it seemed "sensible" to permit a "limited threshhold review" of the Commission's general revenue determinations while remitting shippers to their statutory remedies to determine the legality of particular rates (App. 218a-219a).

[12] The Commission's order in that case has been attacked in Manufacturing Chemists' Ass'n v. United States, D.D.C. No. 3276-69.

be permitted to become effective. It does not consider or determine whether particular rates established pursuant to the increase are just, reasonable or otherwise lawful, *Brimstone R.R.* v. *United States*, 276 U.S. 104, 122-23, but reserves such questions for later determination. The enormous number of rates and commodities involved in a general revenue proceeding, the multiplicity of parties and interests, and the time pressures created by the economic necessities of the railroad industry make it impossible to consider and make determinations with respect to particular rates. *Increased Rates, 1920*, 58 I.C.C. 220, 243; *United States* v. *Louisiana*, 290 U.S. 70, 76-77.

Following the general increase any shipper can, under Sections 13 and 15(1) of the Act, attack any particular increased rates that affect him, and he will obtain revision of those rates and reparations if the rates are determined to be unjust or unreasonable. While the shipper must pay the increased rates pending such a determination, this interim burden exists whenever a Commission order refuses to suspend a proposed rate increase and it is settled that such an order is not reviewable. *Arrow Transportation Co.* v. *Southern R.R.*, 372 U.S. 658, 670.

The shipper's only legitimate interest under the Act is in obtaining a just and reasonable rate on his shipments. The detailed data essential to this determination can only be developed in a statutory proceeding under Sections 13 and 15(1). If any determinations made in general revenue orders prove relevant in the statutory proceeding, the shipper would be free to litigate the issue and obtain judicial review on it, as well as on any other issue in the statutory proceeding. Consequently there is neither need nor justification for a

shipper to obtain judicial review of the preliminary determinations in a general revenue order, and to allow such review would be contrary to settled principles requiring the exhaustion of administrative remedies.

For more than a half century there has been no judicial review of the Commission's orders in general revenue proceedings, and since 1935 the district courts have consistently held such orders not reviewable because shippers have available effective administrative remedies. *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935); *Birmingham Slag Co.* v. *United States*, 11 F. Supp. 486 (W.D. Ala. 1935); *Koppers Co.* v. *United States*, 132 F. Supp. 159 (W.D. Pa. 1955); *Florida Citrus Comm'n* v. *United States*, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd per curiam*, 352 U.S. 1021. The rationale of these cases, correctly followed by the courts below, requires the shipper seeking review of a general revenue order to exhaust his administrative remedies whether he attacks the more general determinations of the Commission or limits his attack to those relating to particular commodities.

City of Chicago v. *United States*, 396 U.S. 162, and the other decisions cited by appellants are not applicable because in those cases no adequate administrative remedy existed to protect the plaintiff's substantive rights. Nor is review of the general revenue order justified as to those limited portions of the order that grant relief under the Fourth Section and from outstanding rate orders, because appellants have not alleged or shown that those provisions inflict any prejudice upon them.

As a practical matter judicial review of the Commission's general revenue determinations is likely to impose new and severe financial burdens on the na-

tion's railroad systems and thus adversely affect the national transportation policy. The Commission's orders contain refund provisions, and the process of judicial review, remand and further reconsideration may greatly prolong the period during which the railroads' refund obligation accumulates. Because of the unsettled state of the law as to the effect of judicial review on the application of the refund provisions, there is a serious risk that at the end of years of litigation the railroads might be required to refund the entire amount of the increase even though there was no determination that any particular increased rate was unjust and unreasonable. The very risk of this vast contingent-liability may severely impair the railroads' capacity to raise capital, to make investments and to make forward plans for the conduct of their business.

There is also a grave risk that the effectiveness of general rate increases would be substantially delayed by a district court's grant of interlocutory relief pending the completion of judicial review. Because of the wide geographic scope of general revenue determinations and the multitude of rates and shippers affected, it is likely that review proceedings would be brought in numerous district courts and that in many instances interlocutory relief would be granted. During the period of interlocutory relief the railroads might suffer large losses which can never be recouped even if the Commission's determinations are ultimately sustained on review and even though there is never a determination that any particular increased rate is unjust and unreasonable.

II.

If the Commission's orders are held to be reviewable, then this Court should affirm the orders on the merits. Immediate review by this Court is feasible because

appellants' attacks do not raise issues that require an examination of the evidentiary record, and such a prompt determination of the validity of the Commission's orders would serve the interests of both the railroads and the shippers.

The Commission's finding that the revenues from the proposed rate increase would themselves fall short of recent increases in the carriers' expenses is supported by substantial evidence and provides a reasonable basis for the Commission's decision to allow the rate increase to become effective. Having found the increase justified by this imbalance, the Commission was not required to make findings on expenses in future years or as to future capital needs of the railroads which the record showed could not reasonably be expected to decrease. The Commission gave to the railroads' rate of return only such weight as it deserved on the basis of the record.

Since the Commission was not required and did not purport to determine that any particular rate resulting from the increase was just and reasonable, *United States* v. *Louisiana*, 290 U.S. 70, it was not required to make findings, as urged by the appellants, with respect to unit costs on particular commodity movements or commodity groups, prejudice as to particular regions, and other questions appropriately reserved for statutory proceedings directed to the level of particular rates. For many years this Court has held that it is proper in large scale proceedings for the Commission to make determinations as to groups of railroads on the basis of typical evidence. *New England Divisions Case*, 261 U.S. 184; *United States* v. *Louisiana*, 290 U.S. 70; *Chicago & N.W. Ry.* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 326.

ARGUMENT

I. THIS COURT SHOULD ADHERE TO THE ESTABLISHED RULE THAT ORDERS OF THE INTERSTATE COMMERCE COMMISSION MADE IN A GENERAL REVENUE PROCEEDING ARE NOT REVIEWABLE AND THAT SHIPPERS MAY VINDICATE THEIR RIGHT TO LAWFUL RATES BY RESORT TO THE REMEDIES EXPRESSLY PROVIDED BY THE INTERSTATE COMMERCE ACT.

A. The Nature of General Revenue Proceedings Makes Judicial Review Inappropriate.

For more than 60 years the Commission has found it necessary to conduct general revenue proceedings to consider whether a general rate increase proposed by all the railroads in the country, or all of the railroads in a region, for the purpose of offsetting increased costs of operation, should be allowed to become effective. These proceedings necessarily involve an enormous number of rates, a multiplicity of parties, interests and contentions and complex problems of general regulatory policy and are often conducted under time pressures created by the economic necessities of the railroad industry. Because of these considerations the Commission has long recognized that in a general revenue proceeding it cannot determine the legality of any particular rate but can only make a preliminary determination that rate increases of a specified general magnitude should be allowed, subject to a subsequent determination of the legality of those increases as they might apply to particular movements of particular commodities.

Thus in 1920, in one of the earliest general revenue proceedings, the Commission said:

> "It would be desirable, if it were possible, to determine definitely the commodities, the sections of the country, and even the individual rates which can best bear the burden of increases, and the re-

> lationships of the rates and differentials which will be disturbed by a percentage increase. This is precluded by the necessity of prompt action upon the main issues presented." *Increased Rates, 1920*, 58 I.C.C. 220, 243 (1920).

Again, in *New England Divisions*, 66 I.C.C. 196, 203 (1922), the Commission explained that "in all . . . general rate cases we have realized and have held that if we were required to consider the justness and reasonableness of each individual rate, the law would in effect be nullified and the Commission reduced to a state of administrative paralysis."

This Court long ago recognized the special limitations and characteristics of general revenue proceedings when it said in reference to such proceedings in the *New England Divisions Case*, 261 U.S. 184, 196-97: "[I]t was the actual necessities of procedure and administration which had led to the adoption of that method [of proceeding on 'evidence deemed typical of the whole rate structure'] in passing upon the reasonableness of proposed rate increases." See also *Chicago & N.W. Ry.* v. *Atchison, T. & S.F. Ry.*, 386 U.S. 326, 341. In *United States* v. *Louisiana*, 290 U.S. 70, 76-77, the Court again recognized that general revenue cases are *sui generis* in the scheme of ICC regulation of railroads when it said that

> "In performing the duty broadly to increase carrier revenue, it is enough if the Commission, in the first instance, makes such inquiry and investigation as would enable it to say that the prescribed increases when applied to members of the group will generally not exceed a reasonable maximum. The extent of this inquiry and the detail of in-

vestigation cannot be marked by this Court with certainty. The size of the group dealt with, the nature of the traffic, the urgency of the relief demanded, these and other factors should condition the Commission's procedure in each case."

It follows from the very nature of the general revenue proceeding that the Commission's findings and determinations in such a proceeding are no more than a first step in answering the ultimate question posed by the statute, *i.e.*, whether individual rates on particular movements are just and reasonable. At this interim stage in the rate-making process the Commission limits itself to making "such inquiry and investigation" as enables it to determine that the increases "will generally not exceed a reasonable maximum" level. This determination is in no sense a final adjudication that the application of the general increase to the movement of particular commodities satisfies the shipper's right to a just and reasonable rate.[13] *Brimstone R.R. v. United States,* 276 U.S. 104, 122-23.

In a general revenue proceeding the Commission protects and preserves the shipper's rights to just and reasonable rates, as it did here, by making it plain in its order that the shipper retains his full array of statutory remedies to vindicate those rights. Thus under Sections 13 and 15(1) the shipper is entitled

[13] The particular rates published by a railroad following a general revenue proceeding are therefore merely carrier initiated rates, not rates that the agency has prescribed or otherwise determined to be just and reasonable. The distinction between carrier-made and agency-made rates was recently illustrated in Moss v. CAB, D.C. Cir. No. 23627, July 9, 1970, where on the particular facts, the court found the agency order reviewable because in effect it prescribed rates (pp. 15-16).

to obtain a determination on the lawfulness of the particular rates applicable to the commodities he ships. And if those rates are determined to be unjust, unreasonable or otherwise unlawful then the shipper is entitled to reparation for the past under Section 16 and to the establishment of lawful rates for the future.

A shipper who is remitted to his statutory remedies will pay the increased rate on his shipment pending a Commission determination on the legality of those particular rates, but that fact does not alter the intermediate character of the determinations of the Commission in a general revenue proceeding. The shipper's right to a lawful rate on his shipments is unimpaired by those determinations and, if it is finally decided that the increased rate is unlawful, he can obtain by way of reparation redress for the interim burden. This interim burden is in no significant respect different from the interim burden that is imposed upon a shipper by a Commission order refusing to suspend a proposed rate increase and the courts have consistently recognized that such an order is merely an intermediate step in the rate-making process, that it does not finally adjudicate the rights of the shipper, and that it is not subject to judicial review. See *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 670; *Long Island R.R.* v. *United States,* 193 F. Supp 795, 797-98 (E.D.N.Y. 1961).

In addition to the fact that neither an order refusing to suspend rates nor the determinations made by the Commission in a general revenue proceeding decide the legality of particular rates there is an additional relevant similarity between the two actions. An order refusing to suspend rates is in substance a tentative administrative judgment that there is reasonable

ground to believe that the rate or rates in question as increased will fall within the zone of reasonableness, so that no further direct intervention by the Commission is necessary in advance of the shipper's resort to his statutory remedies. The Commission's determinations in a general revenue proceeding are a similar tentative administrative judgment, even more general in character, that the generality of the thousands of rates involved as increased will fall within the zone of reasonableness so that no further direct intervention by the Commission is necessary in advance of the shipper's resort to statutory remedies to test the legality of the increase as applied to his shipments.[14] Such a preliminary predictive evaluation, based on Commission expertise and the limited proofs available absent a full hearing on individual rates, is not the kind of agency determination that courts normally review when there is available an alternative proceeding which would be directed to more specific issues, would fully protect the rights of interested parties, and would produce a final and specific administrative judgment more suited for judicial review. *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594; *Toilet Goods Ass'n* v. *Gardner,* 387 U.S. 158.

Although judicial review of Commission findings and determinations in a general revenue proceeding is not required to protect the statutory right of the shipper

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[14] In his concurring opinion in Increased Rates, 1920, 58 I.C.C. 220, 258, Commissioner Eastman noted the analogy between a general revenue proceeding and a suspension case:

> "If the rates prove unduly high, they may later be reduced. The present proceeding has nothing of finality about it and in many respects is similar to a suspension case, where the question is whether or not certain proposed rates shall be permitted to take effect without suspension, a matter left by the act to the discretion of the Commission."

to a just and reasonable rate, that review as a practical matter is likely to inflict substantial prejudice on the railroads for which they have no redress. As we shall show at pp. 35-40 below, this intervention could create a grave danger that the railroads would be deprived for substantial periods of time of the benefits of a general rate increase as applied to thousands of particular rates even though those rates as increased were unquestionably just and reasonable.[15] This result might indeed follow from litigation instituted by shippers who had a direct interest in only a limited number of commodities. And no statutory remedy by way of refund, reparation, or accounting order exists to compensate the railroads for the consequent losses.

The considerations of principle and policy discussed above lead to the conclusion that the Commission's determinations in a general revenue proceeding should not be subject to judicial review in advance of a shipper's resort to the specific statutory remedies that enable him to test the legality of the particular rates applicable to his shipments and, as shall be shown in the next section, the courts have for many years uniformly applied this rule.

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[15] In the past even in the absence of judicial review the railroads have suffered very substantial revenue loss due to the time lag involved in general revenue proceedings. It has been estimated that, "'as a result of the delays'' in the period 1946-52 in instituting increases sought in general rate increase cases, the railroads lost gross revenues of about $1.4 billion. Hearings, supra p. 3, n.2, at 43. The record in this case indicates that the delays in allowing the increase sought cost the railroads approximately $200 million. This figure is based on the estimated loss of $466 million per year between the filing of the application and the 3 percent interim increase allowed on June 19, 1968 (over three months), and on the estimated loss of $200 million per year between that interim increase and the increase allowed in November 1968 (over five additional months) (see App. 264a-265a).

B. The Courts Have Uniformly Held That General Revenue Orders Are Not Reviewable Because Shippers Have Adequate Statutory Remedies with Respect to the Particular Rates That Affect Them.

The considerations discussed above—the necessary tentativeness of the general revenue order and the availability of the statutory remedies—underlie the uniform decisions of three-judge district courts since 1935 denying judicial review of orders entered in general rate increase cases and holding that shippers dissatisfied with increased rates should pursue their available administrative remedy to attack the particular rates applicable to their shipments.

The foundation case is *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487 (E.D. Va. 1935). The court there held that an order permitting the railroads to institute selective rate increases born of the depression was not subject to review because the Section 13 complaint remedy was available to shippers. Essentially the same result was reached in *Birmingham Slag Co.* v. *United States,* 11 F. Supp. 486 (W.D. Ala. 1935).

When about twenty years later judicial review was sought of a general rate increase that occurred during the Korean War, *Algoma* was followed in *Koppers Co.* v. *United States,* 132 F. Supp. 159 (W.D. Pa. 1955). This result was reached despite the intervening abrogation of the negative order doctrine in *Rochester Tel. Corp.* v. *United States,* 307 U.S. 125, and the enactment in 1947 of the Administrative Procedure Act which liberalized judicial review.[16] The rationale for

[16] Now codified in various sections of 5 U.S.C. Pertinently, see 5 U.S.C. §§702, 704.

requiring shippers to exhaust their statutory remedies was well stated in the *Koppers* case:

> "It is not for this court to tinker with the delicate and fragile machinery of rate fixing and rate apportionment until the administrative process has been meticulously and stringently followed and exhausted in accordance with statutory requirement. The Commission must be afforded every available opportunity to utilize its vast reservoir of knowledge, experience, and know-how—in a proceeding wherein an unequivocal compliance with Sections 13 and 15 has been made with a complaint filed and defendant or defendants served, and clear-cut adversary contests evaluated and conclusively ruled upon, before the arm of the court should intercede upon the merits." 132 F. Supp. at 163.

In the period since *Koppers*, the approach embodied in it has been followed by each court that has confronted the question. The decisions include *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd per curiam*, 352 U.S. 1021; the decisions of the two district courts here under review; and, most recently, the decision of a differently constituted three-judge district court in the District of Columbia in *Electronic Industries Ass'n* v. *United States*, 310 F. Supp. 1286 (D.D.C. 1970).[17]

Those seeking reversal in this case attempt to discredit or distinguish *Algoma* and the cases following

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[17] That decision, arising from a suit to review Ex Parte 259 by shippers interested in electronic components, has been appealed by them to this Court (No. 423, Oct. Term 1970). In that case the shippers have concentrated their attack on the specific rates on such products (see p. 27, n. 18, infra).

it on a number of grounds. Their arguments are not persuasive. The Government, for example, argues that *Algoma* if read to support the decisions below has been outmoded by later decisions (br. 38). In particular, the Government contends that the *Algoma* opinion "was permeated with the now discarded notion that because agency action is permissive, it is not subject to review" (*id.*). Similarly, the *amicus curiae* brief of the National Industrial Traffic League (pp. 10-11) accuses *Algoma* of "incorrectly attempt[ing] to make a distinction between rates prescribed and permitted by the ICC." The thrust of these contentions seems to be that *Algoma* is undercut by the abandonment in *Rochester Telephone* and other decisions, and in the Administrative Procedure Act, of any distinctions between affirmative and negative orders and between agency action and refusal to act.

This argument misconceives the basis of the decision in *Algoma*. As the opinion in that case makes clear the decision did not turn on any distinction between affirmative and negative orders; indeed the court did not even cite or discuss the leading cases that gave rise to the negative order doctrine, *e.g.*, *Proctor & Gamble Co.* v. *United States*, 225 U.S. 282. The true and explicit basis of the *Algoma* decision was that the Commission's order did not determine the lawfulness of particular rates and that consequently the plaintiffs should exhaust the administrative remedy provided by statute for the determination of the lawfulness of the particular rates applicable to them. 11 F. Supp. 493-94, 496. The court's discussion in *Algoma* of the permissive character of the Commission's order and of the long established and admittedly correct distinction between rates prescribed and rates permitted by the Interstate Commerce Commission was merely designed to show that particular rates had not been

prescribed by the Commission in that instance and that administrative remedies as to particular rates remained available; the fact that rates have not been prescribed and that Sections 13 and 15(1) relief is still available are matters not even disputed in this case. Nothing in *Rochester Telephone*, the APA, or any other cited authority purports to remove or qualify exhaustion of administrative remedies as a prerequisite to judicial review, and the policies that led to eschewing technical distinctions regarding the form of orders are not in any way addressed to the substantive requirement that avenues of administrative redress be exhausted before resorting to the courts.

A second line of criticism, emphasized by the shipper appellants, is that *Algoma* and certain of the other decisions which followed it involved attacks on particular rates increased by the general rate order, whereas in the present cases there are involved challenges to the "bases for the general increase and not to the application of the increase to specific rates," as appellants in No. 106 *(Alabama Power)* phrase the point (br. 20). The Government also emphasizes the distinction, arguing that if *Algoma* is read narrowly, it determines only that attacks upon specific rates are impermissible before resort to statutory remedies.

We agree with the Government that there should be no judicial review when the attack is directed against the application of the increase to particular commodities or movements.[18] Such an attack raises issues that are substantially identical to those that

[18] Such a case is Electronic Industries Ass'n v. United States, No. 423, Oct. Term, 1970 (see p. 25, n. 17, supra). There, the district court said that "the plaintiff's whole complaint boils down to an assertion that the increase in rates for shipping electrical products is discriminately high and without a rational cost basis" (Jur. St., No. 423, p. 4a).

the shipper would normally raise if he pursues his statutory remedy under Sections 13 and 15(1) of the statute. And since the Commission in a general revenue proceeding does not, and need not, determine the lawfulness of particular rates, *Brimstone R.R.* v. *United States,* 276 U.S. 104, 122-23; *United States* v. *Louisiana,* 290 U.S. 70, and did not do so here, it would be incongruous to require judicial review directed to that issue.

However, conceding for present purposes that attacks on the general revenue order directed against specific rates cannot be reviewed now, it does not follow that more broadly framed complaints against the order are entitled to by-pass available administrative remedies. The contrary contention appears to rest on the unjustified assumption that in a proceeding directed to the lawfulness of the particular rates the shipper could not raise issues directed to the general revenue findings and determinations of the Commission. As we shall show at pages 42-48 below, the shipper's statutory remedies permit him to raise in a statutory proceeding before the Commission attacking particular rates any relevant issue that arises out of the Commission's more general determinations in a general revenue proceeding, and thereafter to obtain judicial review of those determinations insofar as they are a basis for the Commission's decision in the statutory proceeding. The district court in No. 78 (*Atlantic City Electric*) recognized the significance of this fact. There it was urged that the attacks of the shippers were less directed to specific rates than was true in earlier cases such as *Algoma,* but the court correctly held that *Algoma,* and the cases following it, precluded review now, whether the complaint was read as attacking particular rates or the general revenue determinations of the Commission (App. 161a). In

reaching this conclusion the court pointed out that objections to the general determinations of the Commission could be raised in a proceeding directed to the legality of particular rates and that the Commission's rulings on those objections in such a proceeding would thereafter be subject to judicial review (App. 163a).

Finally, the *amicus curiae* National Industrial Traffic League contends that "*Algoma* is premised on the failure of the Commission to suspend the rates, 'a matter within the administrative discretion of the Commission, not now reviewable in the courts' " (br. 11). This argument overlooks the fact that the Commission proceeding involved in *Algoma* (*Emergency Freight Charges, 1935,* 208 I.C.C. 4, (Ex Parte No. 115)), was essentially a general revenue proceeding. The evidence, the arguments presented to the Commission, and the Commission's determinations in that proceeding were all essentially the same as in any general revenue proceeding. The Commission's refusal to suspend in that case allowed the rate increases to become effective, but that is precisely the effect of the Commission's order here. There is therefore no rational basis for saying that the rule that the shipper must first resort to his statutory remedies was more applicable in *Algoma* than it is here.[19] In any event the ground of dis-

[19] The suggestion that the decision in *Algoma* rested basically on the ground that the court had no power to review a refusal to suspend rates is belied by the court's opinion there. The court rested its decision on the broad ground that the plaintiffs had not exhausted their administrative remedies with respect to the particular rates applicable to them. 11 F. Supp. 493-94. It discussed the reviewability of the Commission's refusal to suspend rates merely for the purpose of showing that the fact that the plaintiffs had no administrative remedy with respect to this particular aspect of the Commission's action was immaterial because the power of suspension had been committed by Congress to the discretion of the Commission. Id. at 495.

tinction urged is not available with respect to the *Koppers* case, where the Commission's order followed an investigation conducted pursuant to Section 15(7) (see *Increased Freight Rates, 1951,* 280 I.C.C. 179, 188 (Ex Parte 175)), just as it is not available as to any of the three decisions declining to review attacks on Ex Parte 259.

Two recent decisions of this Court are also alleged to be inconsistent with the *Algoma* line of cases: *City of Chicago* v. *United States,* 396 U.S. 162 and *Abbott Laboratories* v. *Gardner,* 387 U.S. 136. Neither decision, of course, involved reviewability of ICC general revenue orders and in each case there existed a compelling basis for allowing immediate judicial review of administrative determinations that does not exist in the present case.

In *City of Chicago,* the Court held that a refusal of the Commission to prevent the discontinuance of passenger train service was immediately reviewable at the behest of those seeking its continuance. Quite unlike the present case, there was no further avenue of administrative relief for the protestants, let alone one that provided, as here, complete protection of their rights on a fully developed record.[20] As the Court made clear, the Commission's decision amounted to an adjudication of "the merits" (396 U.S. at 166) and in such circumstances the form of the Commission's order did not prevent judicial review.[21]

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[20] In Barlow v. Collins, 397 U.S. 159, and Association of Data Processing Service Organizations, Inc., v. Camp, 397 U.S. 150, no further administrative remedy was available.

[21] The appellants in Number 78 (*Atlantic City*) (br. 10) cite this Court's statement in *City of Chicago* that when in an investigation under Section 15(7) the Commission "finds the proposed rates

In *Abbott Laboratories*, the Court permitted review of Food and Drug Administration regulations which, if not then subject to immediate review, placed the parties subject to them in an intolerable position. Compliance with the regulations would have involved substantial irreparable damage: as the Court said, "to comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies" (387 U.S. at 152). The alternative course of non-compliance "would risk serious criminal and civil penalties for the unlawful distribution of 'misbranded' drugs" (*id.* at 153). Consequently to require the parties to await enforcement proceedings against them in order to challenge the administrative determination offered them no adequate administrative remedy.[22] In the present case, the administrative remedy prescribed by statute is entirely adequate (see pp. 42-48, *infra*), and—as we shall next show—judicial intervention before that remedy is utilized creates substantial danger of irreparable injury to the railroads.

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lawful" its order is reviewable. 396 U.S. at 166 n.5. This is a reference to orders determining the lawfulness of particular rates. This is demonstrated by the Court's citation of Cooper-Jarrett, Inc. v. United States, 266 F. Supp. 318 (W. D. Mo. 1964), aff'd, 397 U.S. 6, which involved just such a determination that specific rates were lawful. In the instant case the Commission did not determine that particular rates were just and reasonable.

[22] Cf. Frozen Foods Express v. United States, 351 U.S. 40, where it was held that a party affected by an order laying down rules that could be made the basis of enforcement proceedings need not wait the institution of such actions before challenging the order.

C. The Proposed Alteration of the Long Settled Rule Relating to Judicial Review of the Commission's General Revenue Determinations Is Likely To Have Practical Consequences That Will Impose New and Unjustified Financial Burdens on the Nation's Railroad Systems.

The elaborate efforts of the Government and the appellants to distinguish the array of decisions rejecting immediate review of general rate orders cannot obscure a salient point of fact: In the more than half a century that general revenue orders have been issued, the kind of premature review sought by the shippers has in fact never occurred. The Government candidly admits (br. 50) that if the appellants prevail in this instance, this "would in practical terms amount to *the establishment of a new kind* of ICC review proceeding with broad geographical application . . ." (emphasis added).

This procedural innovation is likely as a practical matter to impede the railroads in the exercise of their statutory right to initiate just and reasonable rates with the result that they may suffer large losses of revenue to the detriment of their already unsatisfactory financial condition. In considering what amounts to a novel and fundamental alteration in the procedures for review of Commission orders this Court is entitled to consider the practical consequences. See, *e.g., Swift & Co.* v. *Wickham,* 382 U.S. 111, 124-29.

One practical consequence that may result from immediate judicial review of the interim determinations made by the Commission in a general revenue proceeding is that the railroads may be ordered to refund vast amounts of money which they have collected from rates that have never been determined to be unjust or unreasonable and that may in fact be law-

ful under the rate-making standards of the Act. This is a matter of real concern to the railroads.

The Commission's orders in general revenue proceedings normally include refund provisions, as they do here (see p. 4, n. 5 and p. 5, n. 6, *supra*). In the absence of judicial review, however, the potential adverse impact of these provisions upon the railroads is limited in at least two respects. The Commission itself has sought in recent years to mitigate the likelihood and the scope of any refund by authorizing increases by stages as it concludes that particular parts of the increase sought have been justified; it has also attempted to expedite general revenue proceedings so that the period during which any refund obligation may accrue before its final order is limited.

The possibility of numerous suits in any number of district courts attacking general revenue orders—suits as to which no statute of limitations applies (see Gov. br. 50)—creates new and serious problems. Since there has never before been judicial review of general revenue orders the law with respect to the effect of that review on the railroads' obligation under the refund provisions of the Commission's orders is unsettled and uncertain. Whether and to what extent refunds might be required if the Commission's orders in a general revenue proceeding are set aside and remanded for further consideration will be affected by a variety of considerations including, among others, the nature of the infirmity the court finds in the Commission's determinations, the terms of the court's remand, the nature of any action that the Commission may take following judicial review and the correct interpretation of the terms of the refund provisions of the Commission's orders.

As a result of these uncertainties there is grave risk that there will be a substantial extension of the time during which the obligations of the railroads under the refund provisions will accumulate. At the end of the extended process of review, remand, reconsideration by the Commission, and possible further judicial review, the railroads may well be faced with the requirement that they refund enormous amounts of money collected from rates which have never been determined to be unjust and unreasonable. In this respect the railroads' position will be radically different than it has been in the past when the accumulation of the amounts that they may be required to refund has been confined to the more limited period of time involved in the Commission's proceedings. The potential liability of the railroads in this respect is also radically different from their potential liability under the reparation provisions of the statute because that liability depends upon a valid determination that particular rates are unjust and unreasonable.

Even if no refunds were ultimately directed in an individual general revenue case, the very risk of them during years of litigation over a single general revenue order creates grave problems for the railroads. The railroads' ability to raise capital, to make investments in improved equipment and facilities, and to make forward plans for the conduct of their operations would be severely and adversely affected if their rate revenue were subject to such a vast contingent liability.[23]

[23] Under the Act the railroads must assume the risk that, even after tariffs have gone into effect, increased rates may be subject to attack in individual reparations proceedings. However, as a practical matter the very limited number of instances in which individual rates would finally be found unjust and unreasonable makes this ongoing risk incomparable with the risk of being required to refund some or all of a general rate increase.

The sums at risk in general revenue proceedings are enormous; the increase in this one alone involves nearly a half billion dollars a year (App. 265a). To prolong uncertainty for an indefinite period about the disposition of such sums is a critical obstacle to effective planning by the railroads, and thus to a sound national transportation system.

The second adverse consequence that is likely to result from immediate judicial review of the Commission's tentative determinations in a general revenue proceeding is that the effectiveness of general rate increases would be substantially delayed by the district courts' grant of interlocutory relief pending the completion of judicial review—a period that may be substantial.

This delay could occur even though the Commission's general revenue determinations were ultimately held to be valid; it would occur at the instance of complaining shippers who had made no showing that the specific rates applicable to their shipments were unlawful; and it could operate to suspend the effectiveness of increased rates in which the complaining shippers had no interest whatsoever. This delay would increase the existing gap in time between the point when the railroads suffer the burden of the increased costs and the point when they can mitigate that burden by raising their rates. Unlike shippers, the railroads are not protected by the reparation power of the Commission or by tariff provisions for refunds, or by any other device; their revenue loss is truly irreparable. As noted, that time gap is already serious and for many years has been a matter of grave concern to the railroads. (see p. 23, n. 15, *supra*).

The Government appears to recognize the existence of this problem and the practical difficulties that it

would create but attempts to dismiss the matter by asserting that it is "irrelevant" and "hypothetical," and by making certain palliative suggestions (br. 39-41, 51). The argument that the problem is irrelevant is directly contrary to the broad and sensible approach the courts have long taken in construing regulatory statutes. In determining the stage of the administrative process at which agency action is reviewable a court is not required to close its eyes to experience by ignoring the relationship that exists in fact between reviewability and the risk that interlocutory relief will interfere with the orderly and effective administration of the regulatory statute. See *Long Island R.R.* v. *United States*, 193 F. Supp. 795, 799 (E.D.N.Y. 1961).

The Government's characterization of the problem as "hypothetical" is equally remote from reality. A suit to review or set aside a Commission order may be brought in any one of the more than 90 district courts in the United States. A general revenue proceeding affects thousands of commodities and thousands of shippers located throughout the United States. If it is now decided for the first time that the Commission's determinations in such proceedings are reviewable the possibility of numerous suits in different district courts attacking those determinations cannot be dismissed as conjectural or improbable.[24] The suits would be heard by panels of different judges; the shippers, commodities and other facts involved, and the contentions presented, would vary from case to case; and local interests would probably be affected. Given these facts, any assumption that shippers would not seek and in

[24] The Government itself admits that because of the "broad geographic application" of the Commission's general revenue determinations "in future cases involving general revenue orders" a number of courts may be involved (br. 50).

many instances obtain interlocutory relief simply rejects the teachings of experience.

The Government cites cases which it asserts prescribe "stringent standards" governing the granting of interlocutory relief (br. 46). As abstract propositions, these standards are unexceptionable but they are necessarily stated in terms so general that they leave an extremely wide area for discretion in their application in particular cases. A review of the decisions in which these standards have been applied shows that there is no uniformity of view on their precise content or on the relative importance of the different criteria that they lay down to guide the exercise of discretion.[25]

In these circumstances the Government's assurance that the power of the district court to grant interlocutory relief will be "sparingly" employed is meager comfort (br. 39). It is significant that the appellants do not join in this assurance. It would hardly be reasonable to expect them to do so because from the point of view of the interests they represent a substantial possibility of interlocutory relief is one of the more significant advantages of judicial review.[26]

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[25] See the discussion of the relevant cases in Jaffe, Judicial Control of Administrative Action 689-97 (1965). Speaking of the standards the author says that "it is true of them as of so many formulas that they are approximations. Particular situations have begotten answers which emphasize one of the criteria at the expense of the other." The author points out, for example, that although one of the criteria requires the plaintiff to show that he is likely to prevail on the merits, in fact "a showing of likely success is not universally demanded." Id. at 694.

[26] It is instructive to compare the Government's discussion of the problems of interlocutory relief with the discussion found at pages 25-27 of the brief of appellants in No. 78 (*Atlantic City Electric*). The comparison suggests that those appellants do not share the Government's belief that district courts will be or should be niggardly in granting interlocutory relief.

Apparently recognizing that interlocutory relief is more than "hypothetical," the Government itself suggests that as a condition to granting interlocutory relief the district court might impose "a requirement that shippers pay the increased rates into a fund under the control of the court, which the court could then order disbursed to the shippers or the railroads, depending upon the outcome of the suit". (br. 41). The Government then adds that the adoption of this suggestion "might well be preferable to imposing upon shippers the burden of collecting reparations from the railroads in a case where their likelihood of success was relatively strong" (br. 41).[27]

The Government's suggestion that shippers pay the increased rates into the treasury of the court is made with such blithe disregard of the immense practical problems involved that it well illustrates the dangers of *ad hoc* innovations in the statutory scheme. If this condition should be applied only to the shippers of a commodity before the court, the result that would follow from the court's enjoining the railroads' increase as to that commodity would be that other shippers shipping the same commodity would pay lower rates. If the condition were made applicable to all shippers throughout the United States who would be affected by a general

[27] The Government's qualification limiting this condition to "strong" cases is illusory. In the very nature of things a court can hardly make a careful and considered appraisal of the voluminous record and of the numerous and complicated questions involved in a general revenue proceeding on an application for interlocutory relief which normally must be decided quickly and on the basis of preliminary briefing and argument. As has been pointed out above (p. 37, n. 25), there is no agreement among district courts on how strong a showing a plaintiff must make to obtain interlocutory relief.

revenue order, highly complex questions would be presented as to the court's jurisdiction over the thousands of absent shippers. Finally, despite their vague recognition that the "feasibility and mechanics" of the scheme might present difficulties (br. 41), it seems questionable whether the authors of the suggestion have considered the enormous administrative and accounting problems that its adoption would impose upon a district court.

The danger that the effectiveness of general rate increases will be delayed by interlocutory relief is not removed by the Government's other palliative suggestion, which is that review of general revenue orders should be confined to one or a small number of district courts (br. 51). For both legal and practical reasons it is unlikely that the Government's suggestion could limit the number of reviewing courts to any degree that would significantly reduce the risk of interlocutory relief.[28]

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[28] Under 28 U.S.C. §1398(a) plaintiff has the statutory right to bring suit to review a Commission order in any district in which he is resident or has his principal place of business. It has been held that because of this statutory right a district court can not exercise its authority under 28 U.S.C. § 1404(a) to transfer the suit to another district court in which the plaintiff has no residence or place of business. New York Central R.R. v. United States, 200 F. Supp. 944 (S.D.N.Y. 1961).

It is unlikely that on review of a Commission general revenue order the Government's suggestion that proceedings in some district courts be stayed pending the completion of proceedings in others could be effectively carried out. The general revenue determinations of the Commission would raise a multiplicity of issues which would likely be attacked on various grounds by different shippers. The courts are properly reluctant to exercise their discretionary power to stay proceedings pending the completion of proceedings in other jurisdictions so long as there is any difference between the issues and the interests of the parties involved in the

The arguments and suggestions of the United States addressed to the question of interlocutory relief do not remove the basic problem. They merely serve to emphasize that a decision holding that the determinations of the Commission in a general revenue proceeding are immediately reviewable, in advance of any determination of the legality of the particular rates, will introduce new elements of confusion, complexity and delay in the administration of the rate-making provisions of the Interstate Commerce Act and that these consequences will have a serious adverse financial effect upon the railroads.

These practical consequences discussed above cannot properly be regarded as relevant merely to the private interests of the railroads. The economic health of the nation's railroads is a matter of concern to all shippers and to the public generally because of its direct relationship to the ability of the railroads to provide the "safe, adequate, economic and efficient" transportation service contemplated by the Declaration of National Transportation Policy (49 U.S.C. preceding §1). It is therefore appropriate for the Court to consider those consequences in determining whether to change the established rules of judicial review and, for the first time, to require immediate review of the interim determinations made by the Commission in a

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different proceedings. See New York Central R.R. v. United States, 200 F. Supp. 944, 950-51 (S.D. N.Y. 1961).

Moreover, applications for temporary restraining orders and for preliminary injunctions are normally made and decided at the very outset of the litigation before the court would have any adequate opportunity to consider and decide a motion to transfer, if transfer were permissible, or a motion to stay proceedings pending the completion of proceedings in other jurisdictions. For that reason neither of these procedural devices is likely to substantially reduce the risk of interlocutory relief.

general revenue proceeding. It is particularly important that those consequences should be considered in relation to the plan of rate regulation adopted by Congress and the balance that the plan provides between the rights and remedies of shippers, on the one hand, and those of the railroads, on the other.

In the Act, Congress recognized that railroads should be free to initiate rate changes with a reasonable degree of promptness and flexibility to meet increases in costs and other changing conditions. It therefore provided that in general the railroads might initiate rate increases without prior Commission approval. At the same time, however, it provided that once a tariff becomes effective the railroads are bound by the rates stated therein even if a higher charge would be just and reasonable under the statutory standards. In contrast the published tariff is not definitively binding on the shippers who may, by resort to statutory remedies, collect reparations for the past if published rates are shown to have been unreasonably high or otherwise unlawful.

This balance between the interests of the railroads and the shippers is not attained, however, until a proposed rate increase becomes effective. Congress therefore provided that there should be no unlimited or indefinite delay in the effectiveness of a proposed rate change. It authorized the Commission to suspend proposed rate changes but specifically provided that at the end of seven months the rates should become effective. Section 15(7). Thereafter the statutory plan contemplated that the shipper is protected by statutory provisions for reparation where he shows that the particular rates applicable to his shipments are unlawful. Immediate judicial review of the Commission's interim

determinations in a general revenue proceeding—determinations that do not decide the legality of particular rates—will disturb the balance achieved by Congress in this regulatory plan by putting in hazard the right of the railroads to retain the revenue from rates contained in published tariffs even though those rates have not been determined to be unjust and unreasonable, and by creating the possibility of prolonged delays in the effectiveness of rate increases beyond the point in time contemplated by the statute.

It is submitted that an alteration in more than 50 years of administrative and judicial practice that threatens to have these drastic effects on the practical application of the regulatory plan is one that should only be instituted by Congress. In that event, assuming that at this juncture the Congress were persuaded the change would be wise, at the very least it could consider accompanying the change by other procedural or substantive amendments to the law that would serve to maintain the balance that the Act was intended to achieve.

D. The Shippers' Statutory Administrative Remedies Are Fully Adequate to Protect Their Rights under the Interstate Commerce Act.

Rail carriers are bound by the Interstate Commerce Act to publish, charge and collect rates that are just and reasonable, not unjustly discriminatory and not unduly preferential or prejudicial. Shippers and others affected by railroad rates have the means of enforcing these statutory duties by complaining against carrier rates under Sections 13 and 15(1) of the Act; in such proceedings shippers can obtain establishment of lawful rates for the future and can collect reparations for

any past unlawfulness. Section 16. The Act makes it the Commission's duty to entertain any complaint within its jurisdiction. Section 13(1). Unless satisfied, a complaint undergoes investigation and results in a determination whether a challenged rate is just and reasonable and, in some cases, where the rate is found unlawful, the prescription of a lawful rate. A Commission decision in a complaint case is unquestionably subject to judicial review.

Nevertheless, the appellants and the Government insist that these statutory remedies are not adequate. The burden of their arguments seems to be that in a complaint case the Commission's general revenue determinations would necessarily be prejudicial to the shipper and that he would be precluded from attacking those determinations because the Commission would not reconsider them.[29] This argument is unsound as can be shown by an analysis of the conditions that would actually exist in proceedings involving particular rates.

It should be emphasized at the outset that the determinations made in the general revenue order may have no impact at all upon the arguments a shipper may wish to make to show that rates on his shipments are not lawful. For example, the evidence in the complaint proceeding, including evidence relating to ex-

[29] The appellants in No. 78 (*Atlantic City Electric*) contend that the §13 remedy is inadequate because "appellants are seeking redress from the *Commission*, not from any carrier" (br. 16). All that the *Atlantic City Electric* appellants mean by this is that they believe the Commission erred in its handling of the general revenue case and that its errors should be corrected. But, of course, it is only if and to the extent that the errors resulted in higher rates payable by the appellants that the appellants are hurt, so that they do ultimately seek redress against the carriers for their rates.

perience under the rate increases, may remove the basis for any objection to the general revenue order's determinations so far as they do bear on issues the shipper wishes to pursue. The Government recognizes this point when it says in its brief (p. 48) that many of the objections of the Atlantic City Electric appellants "to the kind of evidence the Commission relied on in its preliminary conclusions will evaporate when the Commission considers further detailed evidence in more specialized proceedings under Sections 13 and 15(1)."

Presumably such "further detailed evidence" would include detailed data concerning particular freight movements, the prospects for diversion of traffic and the other factors that are relevant to the lawfulness of particular rates.[30] It is likely that in the generality of proceedings involving particular rates the railroads by necessity would rely upon detailed evidence of this kind to justify the rates rather than upon any general determination made by the Commission in some earlier general revenue proceeding. Indeed, the Commission has held that when a rate is increased in reliance upon an order in a general revenue proceeding and is thereafter attacked, the railroad cannot justify the increased rate simply by reliance upon the Commission's prior

[30] The appellants in No. 78 (*Atlantic City Electric*) seek to buttress their diversion argument in this Court with assertions, wholly outside the record, that some coal traffic has been lost to the railroads since the rates here in question went into effect. If this is the kind of argument that is to be anticipated upon review of general revenue orders it is independently a reason for denying immediate judicial review and allowing the shippers to make their case on a record in a statutory proceeding directed to particular rates in which the Commission would have an opportunity to appraise the shipper's evidence.

general revenue determinations. *Globe Soap Co.* v. *Abilene & So. Ry.*, 40 I.C.C. 121, 123 (1916).[31]

In the event that the general revenue order proves irrelevant to the claims pertinent to the shipper's particular rates, or that its impact is superseded by more relevant evidence, the shipper is unaffected by the general revenue order determinations. Allowing him to challenge the general revenue order in advance of statutory proceedings concerning his particular rates is in such an instance not merely pointless but affirmatively harmful. The time of courts, lawyers and parties is expended resolving contentions that need never be pursued at all. This risk that resources will be needlessly wasted is, of course, one of the traditional reasons why exhaustion of remedies is required. *McKart* v. *United States*, 395 U.S. 185, 195.

It is possible on the other hand that in a complaint proceeding certain of the determinations made in a prior general revenue proceeding might become relevant. If this should occur there is no reasonable basis for contending that the Commission would or could regard the relevant issue as irrevocably resolved by its prior determinations. Res judicata principles have only a limited office in administrative proceedings, see 2 Davis, *Administrative Law* § 18.02 (1958), and—more specifically—reliance on Ex Parte 259 to preclude inquiry in future complaint cases would be inconsistent with the Commission's explicit concluding statement on this very subject: "The increased freight rates and charges authorized herein are not considered as pre-

[31] The Commission there said: "The permission given in *The Five Per Cent Case* . . . was necessarily general. That case did not approve any specific rate as reasonable in itself or as properly adjusted with respect to other rates, nor did it justify in advance any rate which might be published as a result thereof."

scribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry.*, 284 U.S. 370, and will, *in all respects*, be subject to complaint and investigation as provided by the act" (App. 393a) (emphasis added).

The Government and appellants suggest that a passage in *Koppers Co.* v. *Chesapeake & O. Ry.*, 303 I.C.C. 383, 387 (1958), establishes that issues determined in a general revenue proceeding cannot be questioned in a subsequent complaint case. The passage is too murky to support this broad interpretation. In context, it appears rather to be an unexceptionable statement by the Commission that the question whether the record in the general revenue proceeding justified the Commission's action in allowing the general rate increase to become effective was not relevant to the issue of the legality of the particular rates because that issue should be decided on the basis of the record made in the proceeding relating to those rates.[32] Furthermore, a reading of the entire passage cited by the Government and appellants shows that the principle they attribute to the Commission is so lacking in elementary logic that it is inconceivable that the Commission could ever have adopted it.[33] Certainly any attempt by the Commission to apply such a principle in future cases would undoubtedly be corrected by the courts.

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[32] This reading is supported by the fact that in *Koppers* and the related cases (Koppers Co. v. Chesapeake & O. Ry., 301 I.C.C. 284 (1957), and Consolidated Edison Co. v. Virginian Ry., 292 I.C.C. 23 (1954)), the Commission did not rely upon its determinations in the general revenue proceeding but decided the cases on the evidence presented in those cases.

[33] The very passage in the ICC's *Koppers* decision relied upon by the Government and appellants (see 303 I.C.C. at 387) is followed immediately by a statement of the Commission recognizing that the complaining shipper had not been allowed direct

If the railroads were to rely in a complaint case upon any findings in a general revenue order, a shipper would be able to assert that the findings or the proceedings leading to the findings were flawed in any of the ways the appellants allege. The question for the Commission would be whether there were any such errors and, if so, whether the errors infected the findings now relied upon. Even in such a situation, however, the alleged errors would be narrowed to those that had any bearing on general revenue determinations pertinent to the complaint case.

If in a statutory proceeding directed to particular rates the Commission relied in any degree upon its prior determinations in a general revenue proceeding and ruled against the shippers' claims of error in those determinations, the Commission's rejection of those claims would be subject to judicial review under traditional standards. The district court in No. 78 (*Atlantic City Electric*) so held and we submit that its holding was correct:

> "We see no reason why upon making a proper record before the commission in a Section 13 proceeding, plaintiffs cannot preserve the objections which they now assert to the procedure leading up to the general revenue order. We believe that an adverse ruling of the Commission on these objections should be reviewable by a court upon its

judicial review of the general revenue order because his proper remedy was the complaint proceeding then under way in *Koppers*. It would have been patently inconsistent for the Commission to have acknowledged that the shipper could not obtain direct review of the general revenue order because he had an adequate remedy by way of complaint and then to hold in the complaint proceeding that he was bound by the general revenue order's determinations because they were not reviewable.

review of the Commission's final order in the Section 13 proceeding" (App. 163a).

In the end the general revenue order and findings cannot bar a shipper from raising in litigation over any rate by which it is affected any issue relevant to the reasonableness of the rate. If the shipper prevailed and the rate were found unlawful, it would be cancelled and a lawful rate substituted for the future. Further, the shipper would have a basis for claiming reparations for the period in which it was made to pay the unlawful rate in the past. These statutory remedies fully protect the shipper's legitimate interest under the Act without any need for immediate judicial review of general revenue orders.

E. Appellants' Make-Weight Reliance on Those Parts of the Commission's Orders That Grant Relief under the Fourth Section and from Outstanding Rate Orders Is Not Entitled to Serious Consideration.

The appellants in No. 106, (*Alabama Power*) but not those in No. 78 (*Atlantic City Electric*) contend that the Commission's orders are reviewable because of the relief from Section 4 of the Interstate Commerce Act that they granted and the modification of outstanding rate orders that they effected. The contention, rejected years ago in *Algoma,* is without merit.

No appellant in No. 106 claims that he is prejudiced by the Section 4 relief and the outstanding rate order modification. Instead the appellants invoke the interests of a hypothetical shipper who obtains from the Commission an order prescribing a maximum railroad rate only to see the order set aside the next day as an incident to a general revenue order (br. 22-23). None of the *Alabama Power* appellants claims to be such a shipper. Likewise, no shipper in the proceeding before the Commission claimed to be in-

jured by reason of the Fourth Section long-and-short-haul relief granted by the Commission. Nor was any such claim made in either of the courts below by any of the appellants.

What the *Alabama Power* appellants seek is review of an entire general revenue order on the basis of incidental and minor parts which are not shown to have inflicted any injury on them. In answer to the same kind of argument the court in the *Algoma* case said that the rate order modifications and Fourth Section relief orders before it

> "are of themselves purely incidental to the main purpose of the proceeding before the Commission. Furthermore, it is to be noted that it is not clearly shown by the plaintiffs that they suffer any injury by virtue of these particular orders, which are merely a means to an end." 11 F. Supp. at 492-93.

Here the appellants have not even alleged injury as a result of these orders, much less shown it.

Moreover, even if appellants alleged and established injury to them because of the rate order modifications and Fourth Section relief, it would not follow that they would be entitled to the relief they seek in this case. At most, on the very rationale for review they urge, they would have a right to immediate judicial review only as to those few rates as to which prescriptive orders were outstanding or Fourth Section relief was necessary in order to allow increases. As to the vast majority of rates involved in this proceeding, which carriers are free to increase without advance Commission approval, the Commission's order would be no more subject to review than if it contained no reference whatever to Fourth Section relief or modification of prescribed rates.

II. IF THE COMMISSION'S ORDERS ARE HELD TO BE REVIEWABLE THEY SHOULD BE SUSTAINED ON THEIR MERITS

The railroads in their motion to affirm (p. 19) stated that if jurisdiction were noted and the Commission orders held reviewable, they would ask the Court to affirm in both appeals on the ground that there is no error in the Commission's orders. This request is made in the interests of conserving judicial resources by avoiding further litigation over the Ex Parte 259 that may occur in a number of district courts, and because of the extreme practical importance of resolving the validity of the general revenue orders here involved as promptly as possible (see pp. 33-35, *supra*).

The Government contends that the merits of the general revenue orders are not before this Court, asserting that the district courts did not pass upon the merits and that the appellants did not "present the issue for decision by this Court" (br. 18, n. 16). The fact that the courts below did not review the merits of the Commission's orders is not a bar to review by this Court, particularly where the issues on the merits "were thoroughly explored and contested before the Commission." *Chicago & N.W. Ry.* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 326, 356. Nor is it relevant that the appellants did not raise the question on appeal; the appellees are entitled to defend the judgment below on any ground that will sustain it.[34]

[34] Since these appellees gave full notice of their intention to argue the merits, the failure of the appellants to brief the question is no bar to review. See United Gas Co. v. Callery Properties, Inc., 382 U.S. 223, 231 & n. 3 (separate opinion).

Shipper contentions directed to the merits of the Commission's orders were briefed in both of the lower courts. The district court brief of the shipper appellants in No. 78 (*Atlantic City Electric*) is at App. 88a-115a. Nine copies of the district court brief of the appellants in No. 106 (*Alabama Power*) will be lodged with the Clerk of the Court.

The mere size of the record before the Commission is not a valid reason for further delay; the contentions of appellants raise questions which do not require the detailed examination of the record but can be resolved on the face of the Commission's two reports. There is therefore no occasion to require initial consideration of the appellants' attacks on the merits of the orders by the district courts. While the Government also argues with respect to the merits that "the issues are complex" (br. 18, n. 16), we believe that brief examination will show the attacks on Ex Parte 259 advanced by appellants in the courts below can be speedily rejected.

Assuming the Commission's orders here involved are reviewable, there are certain general considerations applicable to that review which deserve comment before considering separately the various attacks that appellants make upon the validity of the orders.

As this Court observed in *Alabama G. S. R.R.* v. *United States*, 340 U.S. 216, 228, "The basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented." It is equally true that the nature and extent of the evidence required to support findings will depend upon the function and content of the findings and the context in which they are made. It is therefore proper in the instant case to consider the correctness of the Commission's orders in the light of the nature and function of the general revenue proceeding in which they were made.

As we have pointed out at pages 18-19 above, because a general revenue proceeding involves literally thousands of rates and commodities and a multiplicity

of parties and interests, and is usually conducted under severe time pressures, it would be impossible for the Commission in such a proceeding to determine that particular rates applicable to the shipment of particular commodities were just and reasonable, and this Court has held that such findings are not required. *United States* v. *Louisiana,* 290 U.S. 70, 76.

Accordingly, the Commission's determination is limited to a preliminary judgment that rate increases of a specified general magnitude should be permitted to become effective subject to the subsequent determination of the question whether the resulting rates are just and reasonable as they apply to particular movements of particular commodities. An order of the kind here involved does "not approve or fix" any particular rate or approve in advance any rate published as a result of the order, *Brimstone R.R.* v. *United States,* 276 U.S. 104, 123, and such questions are left open "in all respects" for further investigation and decision (App. 393a).

The nature and scope of appellate review in these circumstances should be consonant with the necessary limitations on the scope of the Commission's inquiry, the limited legal effect of the Commission's orders, and the opportunity shippers unquestionably possess to obtain Commission review of the particular rates affecting them. In these circumstances the requirement that the Commission's order be supported by adequate findings based upon substantial evidence is fully met if the Commission explains clearly its reasons for permitting the proposed rate increase to become effective and if the evidence indicates that the action was not arbitrary or capricious.

As we shall show below, the Commission fully and clearly explained its reasons for permitting the rate

increase to become effective and there was ample evidence in the record to provide a reasonable basis for this decision. It follows that under any standard of review that may properly be applied the Commission's orders should be sustained.

A. There Is No Merit in the Attacks on the Commission's Orders Made by Alabama Power Co., et al. (Appellants in No. 106).

The complaint of the *Alabama Power* appellants, in the Government's words, focused "upon the Commission's findings as to the railroads' costs and revenue needs and the reasonableness of the overall rate level . . ." (Gov. br. 10).

Those appellants asserted in the district court that the Commission misapplied statutory standards in determining that the increased revenue was necessary; that the Commission failed to make findings on the revenue needs of the railroads in the future; that it improperly treated the railroads' rate of return; and that the Commission improperly treated all railroads as a single group and did not consider the unit costs of handling individual items of traffic. See brief of Alabama Power Co., et al., D.D.C. No. 2970-68, pp. 13-39 (hereafter "D.D.C. br.").

The appellants' argument that the Commission misapplied statutory standards amounts on analysis to an assertion that the Commission's findings do not provide a rational basis for permitting the proposed rate increase to become effective. As we have shown above (pp. 6-7, *supra*), the Commission made particularized findings as to total expenses of the railroads during both a "base" year—1966—and a subsequent "constructive" year "which embraces all

known changes of record" since the base year (App. 263a). The Commission found that the increase in expenses during this period was approximately $855.4 million (App. 263a),[35]

Compared to this increase in expenses, the Commission found that the increase under consideration in Ex Parte 259 together with a prior increase since 1966 would generate only about $765 million in revenue. As it concluded, "approval of the entire rate adjustment would thus leave [the railroads] short by at least $89.2 million of annual revenue needed simply to cover their increased expenses" (App. 265a). The Commission also noted that the railroads had enjoyed an overall rate of return of 3.90 percent in 1966 and would obtain only 3.12 percent return in the constructive year even if the proposed increases were effective, returns which it described as "clearly inadequate" (App. 267a). The Commission also found that the increased rates "would have no material adverse effect on the movement of traffic" (App. 274a).

The appellants attack these findings as legally insufficient to support the Commission's conclusions. They direct their principal criticism to the Commission's choice of 1966 as the base year for purposes of comparison, describing its selection as "arbitrary"

[35] Recognizing that "cost totals alone are not meaningful except in relation to the volume of transportation performed" (App. 261a), the Commission analyzed unit operating costs by years. These figures confirmed that after remaining fairly level for several years through 1966, operating expenses per 1,000 gross-ton-miles rose from $5.58 in 1966 to $6.05 for the constructive year (App. 261a), an increase of 8.42 percent. The Commission in fact noted that this increase was "consistent" with the total dollar increase of $855.4 million which represented a growth of 8.58 percent between 1966 and the constructive year (App. 264a).

(D.D.C. br. 17). The Commission explained that the use of that year was reasonable and fair to shippers "because it reflects recent experience not complicated by a major rate revision and the traffic volume is close to the current level" (App. 263a). This choice was reasonable and precisely the kind of choice which is within the Commission's competence.

The Commission's exercise of judgment is not shown to be arbitrary or irrational by appellants' argument that the selection of 1966 was not permissible in the absence of a subsidiary finding that the level of rates earned in that year was the minimum necessary to support adequate transportation. While appellants describe the year 1966 as one of "unparalleled prosperity for the nation's railroads" (D.D.C. br. 17), the Commission found that the rate of return in that year was only 3.90 percent (App. 267a). Having explicitly found that such a return was "clearly inadequate" (App. 267a), the Commission did more than was necessary in stating the obvious. Moreover, the increase in Ex Parte 259 still left the railroads well *below* 1966 levels (App. 264a-265a).

Appellants also argued that the Commission's ultimate findings of revenue need are fatally defective because although the Commission made findings with respect to the railroads' expenses in one constructive year, it made no such findings for additional years in the future, and particularly made no findings with respect to the capital needs or dividend requirements of the railroads (D.D.C. br. 18-21).[36] The Commis-

[36] The appellants in a related contention asserted that the record did not provide evidentiary support for the findings it says the Commission "should have made" to establish revenue need (D.D.C. br. 18). Since these findings were not necessary the arguments

sion's findings with respect to the imbalance between increased expenses and revenue in one constructive year was a reasonable basis for its determination to permit the proposed rate increase to become effective. It was not required to make comparable estimates for an indefinite series of future years. Even the appellants do not suggest that the record before the Commission provided the slightest support for any conjecture that the relationship between the railroads' revenues and their increased expenses would change within any reasonable time to the railroads' advantage.[37]

It is also clear that precise findings as to future capital needs would have been redundant because there was no basis whatever for concluding that capital expenditures would be substantially reduced in the immediate future. The Commission had found in *Increased Freight Rates, 1967*, 329 I.C.C. 854, 872 (1968) (Ex Parte 256), that the railroads' "need for large capital expenditures . . . will not abate in the foreseeable future . . . ." In Ex Parte 259 the Commission's interim report and appellants' brief show, in fact, that there was evidence before the Commission with respect to the railroads' capital needs and the rate of return necessary to enable the railroads to meet those needs (App. 265a-266a; D.D.C. br. 22-27). The Commission

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that appellants addressed to this evidence are irrelevant. In any case these arguments are merely attacks on the Commission's appraisal of the weight of the evidence and on the inferences that it drew therefrom. The courts have consistently held that on judicial review they will not substitute their judgment for that of the Commission on such issues. See for example Illinois Central R.R. v. Norfolk & W. Ry., 385 U.S. 57.

[37] In fact there has been no such favorable change in the railroads' situation as is shown by subsequent general revenue proceedings (see p. 13, supra).

"therefore was entirely reasonable in determining that, having found that the increase was justified because of the imbalance between expenses and revenue, it was not required to pursue a line of inquiry or make findings that would not affect the outcome of the case."[38]

A further objection of the appellants to the Commission's revenue need determinations was directed to the Commission's discussion of the railroads' rates of return (D.D.C. br. 27-32). This objection is briefly answered by the Commission's explicit statement that its basic allowance of the rate increase was justified on "other grounds"—the increased expenses suffered since 1966 and the lesser amount of revenue to be produced by the rate increases. In any event, the Commission is not forbidden by any precedent or statute from giving appropriate weight to the rate of return which, as this Court has said, is "a familiar tool of analysis in the financial community." *Chicago & N. W. Ry.* v. *Atchison, T. & S. F. Ry.*, 387 U.S. 326, 343-46.

The *Alabama Power* appellants also object to the Commission's orders because they granted the same rate increase nationwide (D.D.C. br. 32-35). It is

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[38] The appellants' citation in their district court brief (pp. 19-20) of D.C. Transit v. WMTA, 350 F.2d 753 (D.C. Cir. 1965) does not advance their argument. That case involved a definitive determination that particular rates were just and reasonable and has no bearing on the kind of findings that may be appropriate and sufficient in a general revenue proceeding where the Commission merely determines whether to permit a proposed general rate increase to become effective and reserves for later consideration the question whether any particular rates are just and reasonable. Furthermore, that case arose under a regulatory statute whose provisions differed in significant respects from the provisions of the Interstate Commerce Act.

undeniable, however, that the impact of cost increases was felt everywhere. Overall the increased rates still fell short of meeting the railroads' total need for revenues to offset rising costs. No regional group of carriers was put in a position by the increases to make an unreasonably large profit. Even though there are regional differences in the returns realized by the railroads, returns in all regions are below a reasonable level (App. 267a). The Commission's practice of treating railroads as groups, born of the necessities of large-scale rate-making and divisions cases, has long had the sanction of this Court. *Chicago & N.W. Ry.* v. *Atchison, T. & S. F. Ry.*, 387 U.S. 326, 340-43; see *United States* v. *Louisiana*, 290 U.S. 70, 76-77. There is no indication in any of the cases on the subject that the group may not be nationwide,[39] and the nationwide approach is especially suitable where the Commission explicitly reserves to shippers full opportunity to bring maladjustments to its attention for correction (App. 276a).

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[39] Certain of the appellants argue that because of the amendment of Section 15a(2) of the Interstate Commerce Act in 1933, United States v. Louisiana, supra, and similar cases are no longer good law and that after the amendment it was improper for the Commission in a general revenue proceeding to make determinations with respect to the railroads as a group (D. D.C. br. 34). That amendment was part of a revision that removed from the Act the "re-capture provisions" first enacted by the Transportation Act of 1920. It was not intended to prevent the Commission from making determinations with respect to groups of railroads in any situation where such determinations were appropriate, as the decision in Chicago & N.W.Ry. v. Atchison, T. & S.F. Ry., 387 U.S. 326, shows. Since 1933, the Commission in general revenue proceedings has consistently followed the practice of making determinations applicable to large groups of railroads. If it could not do so it would be severely crippled in discharging its regulatory responsibilities.

The Alabama Power appellants' final argument below related to unit costs (D.D.C. br. 36-39). Its contention on this point is very similar to the contention made by the appellants in No. 78 (*Atlantic City Electric*) that we shall next consider.

B. There Is No Merit in the Complaints Against the Commission's Orders Made by the Appellants in No. 78 (Atlantic City Electric Co., et al.)

The appellants in No. 78 (*Atlantic City Electric*) argue that the Commission's orders are invalid because the Commission did not "affirmatively" develop an adequate record; because the Commission erred by failing to make findings on the unit costs of transporting particular commodities; and because of alleged deficiencies in certain of the Commission's determinations relating to particular commodities, such as coal and grain (App. 92a-108a; see 40a-42a).

The argument that the Commission did not "affirmatively" develop an adequate record is essentially a procedural argument. It rests on the assertion that the Commission was required to direct its Bureau of Accounts or a member of its legal staff to participate in the proceeding (App. 95a-98a). This argument is directed to the Commission's internal administration and its allocation of staff responsibilities. The Commission, like other administrative agencies, "must have wide scope in its administration of the business committed to its charge" and the problem of administering that business "is singularly within" its prerogative. *United Airlines* v. *CAB*, 228 F.2d 13, 16 (D.C. Cir. 1954). Whether participation of the Commission's staff in the proceeding was appropriate is one of "the subordinate questions of procedure" which is left to

the Commission's discretion. *Cf. Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134, 138. Appellants' arguments provide no rational basis for the conclusion that the Commission's orders are invalid because of the way in which the Commission exercised its discretion in this case.

The authorities cited by appellants do not suggest that the Commission is required to direct that members of its staff participate in a general revenue proceeding; those authorities cited are general admonitions about the agency's responsibility to develop an adequate record (see App. 95a-103a). These admonitions are not pertinent here. Participation by the agency staff may be important when the alternative consists solely of reliance on railroad evidence, see *Baltimore & O. R.R.* v. *United States*, 386 U.S. 372, 436 (concurring opinion). But in the instant case, there was vigorous participation by numerous shippers and powerful shipper associations who opposed the railroads' proposals and subjected those proposals to detailed criticisms.[40]

Appellants' assertion that because of the lack of staff participation in the proceeding the Commission failed to develop an adequate record is not supported by any specific showing of prejudice to themselves. It is cast in general assertions which simply reflect the

[40] There is no basis for the claim made by certain of appellants (see App. 7a) that the ICC erred when it omitted to provide for a recommended report by the examiner "without stating on the record that this procedure was eliminated because of the necessity of the due and timely execution of its functions . . . ." Before entering into any hearings, the Commission explicitly ordered that the proceeding "will not be the subject of an examiner's recommended report and order because due and timely execution of our functions requires an expedited decision" (App. 247).

appellants' dissatisfaction with the Commission's exercise of its informed judgment. As the Commission's reports and the discussion in this brief show the Commission developed a fully adequate record and found in that record a reasonable basis for permitting the proposed rate increase to go into effect.

The central substantive contention of appellants appears to be that the Commission was required to make findings related to the cost of particular commodities or movements of commodities (see App. 104a-108a). The Commission did examine unit costs of traffic movement generally, finding that they had risen about 8.42 percent between 1966 and the constructive year (App. 261a). However, the appellants insist that cost figures for the movement of individual commodities—for example on bituminous steam coal—should have been developed (App. 106a). The Commission held that "costs of specific commodity movements are not in issue", explained its reasons for this determination, and cited earlier general revenue proceedings in which this principle was applied (App. 205a).

The dispute on this point plainly does not require an examination of the record as a whole or particular evidence, nor is it one that will be illuminated by analysis in a district court. The dispute turns simply on a question of law, that is, whether in a general revenue proceeding, where the Commission is not determining that particular rates are just and reasonable, it is required to determine unit costs for the movement of each of the many particular commodities or groups of commodities involved. There is no provision of the Act or judicial decision that imposes this burden upon the Commission. As the Commission here pointed out, to impose any such requirement would require it to engage in the "compilation, presentation,

and evaluation of data of such massive proportions" as to "make impossible the effective prosecution" of its regulatory functions (App. 286a).

Appellants' insistence that cost-findings on individual commodities or groups of commodities are essential rests upon a fundamental misconception of the function and effects of the Commission's order. They assume that in this proceeding the Commission was either required to determine that particular rates were just and reasonable or that in fact it did so (see, for example, App. 106a). The first assumption is invalid as a matter of law, *United States* v. *Louisiana*, 290 U.S. 70, 76;[41] the second is incorrect in point of fact because the Commission plainly stated that it was making no such determinations (App. 275a-276a).[42]

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[41] The assertion that United States v. Louisiana is no longer authoritative because of the 1933 amendment to the Interstate Commerce Act (App. 108a) has been discussed at p. 58, n. 39, supra.

[42] The argument that unit costs must be considered for particular commodities is the essence of the argument made by the Secretary of Agriculture in the district court. The Secretary to an even greater degree than the shipper appellants (see App. 197a) asserted that, whether or not required by general principles, examination of individual unit costs in this proceeding was required by a paragraph in Increased Freight Rates, 1967, 332 I.C.C. 280, 285-86 (Ex Parte 256). The argument is based upon a misreading of the Commission's statement in that case which was directed to establishing unit costs as a check on the relevance of total dollar costs. Id. at 286. Nothing in the Commission's discussion there suggested that the Commission contemplated considering unit costs for individual commodities or even groups of commodities in general revenue proceedings. The Commission itself explicitly rejected appellants' extrapolation of that discussion: "Our admonition in Increased Freight Rates, 1967, 332 I.C.C. 280, 285, respecting a study of the unit costs of performing transportation services did not contemplate detailed, individual studies of particular traffic movements" (App. 285a-286a).

Appellants also claimed that there was "no evidence at all" to rebut their evidence that the proposed rate increase would cause a substantial loss of coal traffic by stimulating the use of other forms of energy or other modes of transportation (App. 93a). This assertion is demonstrably incorrect on the face of the Commission's final report which summarizes the evidence that the railroads presented on this issue. There was substantial support in this evidence for the Commission's rejection of appellants' argument (App. 309a-310a).

As a part of the same argument, appellants asserted that the Commission delegated its functions to private parties (App. 93a). They rest this assertion merely on the ground that the Commission pointed out in its discussion of coal traffic that "should competitive situations arise, appropriate adjustments can be made by producers and carriers" (App. 310a). This statement is nothing more than a wholly proper observation by the Commission that if any danger of substantial diversion of traffic should arise it was reasonable to expect that the railroads would make competitive adjustments in coal rates. Here again, the Commission's own report shows that there was substantial evidence to support the Commission's view (App. 303a).

In the district court, the State of New York and the agencies of several other states also complained of the Commission's orders (see App. 36a). They did not advance the more general contentions already discussed; rather, as the Government states (br. 12), their attacks were "directed with considerably more specificity than the coal users' complaint, to the authorization of a six percent increase in rates on grain

and feed moving into the Northeast." The nature of the arguments is generally illustrated by the claim that the increases "were unduly prejudicial of the Northeast and unduly preferential of the Southeast" (App. 41a), and by the claim that the Commission refused to consider "a comprehensive cost study for the traffic involved. . . ." (App. 40a).

The Commission made it clear that a general revenue proceeding is not the appropriate place for resolving such contentions. It said, for instance, that "rate differences between various origin areas cannot be appropriately considered or adjusted in a general increase proceeding" (App. 334a) and that the "compilation, presentation and evaluation" of cost data relating to specific commodity movements "would make impossible the effective prosecution of our regulatory function . . ." (App. 286a). If the somewhat less specific findings urged by other appellants and discussed above can be deferred pending statutory complaint proceedings under Sections 13 and 15, as even the Government concedes is proper (br. 45), then certainly claims of this kind need not be pursued by the Commission before allowing a general rate increase to become effective.

CONCLUSION

The judgments of the district courts should be affirmed.

Respectfully submitted,

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